

# System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining

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## I. INTRODUCTION

“Bethany” was a 28-year-old single mother of four, accused of accessory to felonious assault by the State of Ohio, a charge to which she vehemently asserted her innocence.<sup>1</sup> Despite the fact that she possessed no appreciable criminal record<sup>2</sup> and had strong familial ties to the area in which she was imprisoned, her bond was set at an extremely high dollar amount. Unable to come up with the necessary bail money, she remained in jail awaiting trial for over three months.<sup>3</sup> Over this time, she lost custody of her children to their father (a man who chose to maintain little contact with the children prior to this time) and learned that her mother, who lived over a thousand miles away, had developed terminal cancer.

After several rounds of continuances began to add up, Bethany became desperate to escape the jail so that she could protect her children and comfort her mother. Finally, at a time when she was battling daily episodes of depression, she was offered a deal by the prosecuting attorney—plead guilty to a lesser felony and get out on time served or remain in jail awaiting trial. Though she was desperate to prove her innocence in court,<sup>4</sup> she could no longer bear to be away from her loved ones in their time of need. Disregarding the consequences of pleading guilty to a felony, she told her attorney that she would accept the deal: “Anything,” she cried, “anything to be with my family.” Shortly after this conversation, the court accepted her plea. Bethany was finally released, a joyous convicted felon.

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<sup>1</sup> The woman’s name has been changed to protect her identity. The author met her while working as a law clerk for a criminal defense firm in Columbus, Ohio, during the summer of 2003.

<sup>2</sup> Her only documented offense was a citation for running away from her adoptive parents as a juvenile.

<sup>3</sup> This delay was due to numerous continuances filed by both the state and her own attorney for various reasons.

<sup>4</sup> She believed, as did her attorney, that she had a very strong case.

This scene occurs with disturbing regularity in the American criminal justice system.<sup>5</sup> In plea negotiations, criminal defendants must often choose between persistently asserting their innocence and gambling on the system on the one hand and admitting guilt to a lesser charge, thereby receiving an early release and avoiding the chance of a wrongful conviction to a serious crime or a harsh judicial sentence on the other.<sup>6</sup> Many others suffer

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<sup>5</sup> Plea bargains are made in the vast majority of criminal cases that lead to convictions. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696 (2001) ("Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty or nolo contendere plea."); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 487 (1996) (estimating that 80–90% of criminal convictions in the United States arise from plea bargained guilty pleas); Michael Kinsley, *DNA Evidence and the Real American Justice System*, MILWAUKEE J. SENTINEL, Dec. 16, 2002, at 11A, available at LEXIS, News Library, Miljnl File ("But for every one criminal conviction that comes after a trial, 19 other cases are settled by plea bargain."). According to Kinsley, a columnist for *The Washington Post*, the plea bargaining system is built around the pleas of innocent defendants. "[W]hen, as part of a plea bargain, innocent people confess to a crime they did not commit, that isn't a breakdown of the system. It is the system working exactly as it is supposed to." *Id.* He sees this reality as an inevitability of the system that preys on risk-averse defendants. *Id.* "Plea bargaining is a way of trading the risk of 20 years to life for the certainty of five to seven. But by creating this choice, and ratcheting up the odds to make it nearly irresistible, American justice virtually guarantees that innocent people are being punished." *Id.*

At least one prominent legal author believes that the inverse is true, so far as it pertains to capital cases. See Scott Turow, *To Kill or Not to Kill: Coming to Terms with Capital Punishment*, THE NEW YORKER, Jan. 6, 2003, at 42 ("Most defendants charged with capital crimes avoid the death penalty by reaching a plea bargain, a process that someone who is innocent is naturally reluctant to submit to. Innocent people tend to insist on a trial . . ."); see also Rory K. Little, *Why a Federal Death Penalty Moratorium?*, 33 CONN. L. REV. 791, 795–96 (2001) (asserting that it does not appear that there are any "actually innocent" defendants on death row in the federal system, given the high quality of counsel assigned to represent such defendants and the extensive appellate and habeas corpus proceedings available to them).

<sup>6</sup> See Gross, *supra* note 5, at 487 (finding that "[t]hreat is an essential part of all plea bargaining . . ." with this threat being that the offered deal must be taken or a worse result will occur if and when the defendant is convicted). Innocent defendants in particular are heavily affected by this implied threat and can be convinced to plead guilty; this "may happen with some regularity for innocent defendants who are offered light deals: time-served, diversion, 6-months unsupervised probation, and so forth." *Id.* at 487–88. Other commentators agree that guilty pleas may not be a defendant's actual admission of guilt or acceptance of responsibility: "[M]ost guilty pleas are not the fruit of genuine repentance. Instead, defendants feign repentance to earn sentence reductions." Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The*

unconscionable offers from vengeful prosecutors, deficient assistance from overworked public defenders, and self-serving deals from greedy private attorneys.<sup>7</sup> In these cases, the defendants are powerless to fight the system,

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*Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1399 (2003) (citation omitted).

One notable recent illustration of these concepts occurred in the ordeal of Yaser Esam Hamdi, an American citizen and terrorism suspect declared to be an “enemy combatant” by the United States government in 2001 and imprisoned in a military prison for over two years without charges filed against him. *See* MSNBC, ‘*Enemy combatant*’ *Hamdi to be released* (Sept. 22, 2004), available at <http://www.msnbc.msn.com/id/6073635> (last visited Oct. 21, 2004). Despite his American citizenship, Hamdi was denied access to a lawyer during that time because of his “enemy combatant” status. *See id.* He was eventually released to Saudi Arabia after he agreed to renounce his American citizenship, never return to the United States, endure lifelong restrictions on travel to Afghanistan, Iraq, Israel, Pakistan, Syria, the West Bank, and Gaza, and notify Saudi officials if he ever intends to enter the country. *See id.* According to Hamdi’s attorney, he decided to make a deal instead of taking his case to court because he was not assured of victory in court, and “[h]e’s been in solitary confinement and couldn’t stand it any more. Anything that would get him home in the short term to his family would be preferable to almost any other alternative.” *See id.* Regardless of Hamdi’s actual guilt or innocence, the procedure taken to reach an agreement was clearly weighted against him. As such, the settlement cannot be trusted as a true manifestation of his guilt to the (suspected) charges.

<sup>7</sup> The impact of these types of malpractice varies according to jurisdiction—some courts have been willing to ignore substandard assistance in plea bargaining if the defendant eventually receives a fair trial, though others have rejected that view for actions like failure to inform the defendant of a plea offer. *See* *United States v. Day*, 969 F.2d 39, 44 & n.6–7 (3d Cir. 1992) (discussing a split among courts on how sufficiently prejudicial defense attorney action must be before reversible error arises). The burgeoning problem of innocent defendants pleading guilty has caused some lawmakers to take action to prevent it. For example, a group of Virginia state senators recently proposed amending a piece of legislation that would relax the state’s strict laws on when new evidence of innocence can be introduced to protest a conviction to include individuals who had pled guilty as part of a plea bargain. *See* Kevin Miller, *Senators’ Effort on 21-Day Bill Falls Short*, ROANOKE TIMES & WORLD NEWS, Feb. 6, 2004, at B5, available at LEXIS, News Library, Roanok File. Although they were unsuccessful, the senators justified their actions as necessary to counteract the effect of poorly-performing appointed defense counsel on the plea bargaining process. *Id.* (according to Virginia Sen. Henry Marsh, “plea bargains are a common tactic used by defendants—including innocent ones—to lessen their time behind bars. Marsh suggested that inadequate representation by public defenders and court-appointed attorneys may prompt some innocent defendants to plead guilty”).

bound by the negotiating skills of their attorney and their prosecutor's promises to engage in good faith bargaining.<sup>8</sup>

The United States Supreme Court did not envision this problem-riddled system when it legitimized plea bargaining as an alternative means of case resolution for the overburdened criminal justice system.<sup>9</sup> Rather, the Supreme Court explicitly held that plea bargains should only be entered into in good faith.<sup>10</sup> If this is not the case, justice cannot truly be served, as defendants are declared guilty and assigned a punishment without the protections of a system designed to safeguard their innocence above everything else.<sup>11</sup>

Unfortunately, plea bargaining according to those rules has vanished. Defendants are now facing the realities of a system that imposes a sentence upon them without the procedural fairness required by due process.<sup>12</sup> This

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<sup>8</sup> See Martin Marcus, *Above the Fray or Into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193, 1210-11 (1992) (finding that defense attorneys can ineffectively assist defendants in the plea negotiation process, but this fact is often difficult to prove on appeal, given the sparse record of what occurred in plea negotiations).

<sup>9</sup> *Brady v. United States*, 397 U.S. 742, 755 (1970).

<sup>10</sup> The Court presented an exacting definition of what good faith in plea bargaining entails, or, more precisely, what constitutes an agreement made in bad faith:

'A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).'

*Id.* (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957)). Further evidence of the Supreme Court's demand for fairness in plea bargaining is seen in a case decided one year after *Brady*. See *Santobello v. New York*, 404 U.S. 257, 261 (1971) (listing several benefits that plea bargaining offers, including efficiency, avoidance of potential problems from the pretrial release of dangerous defendants, and quicker rehabilitation for suitable defendants, but noting that "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor"). Without such fairness, the guarantee of the due process of law is worthless. See *id.* at 262.

<sup>11</sup> See Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1329-30 (1999) (finding that many of the constitutional rights waived by defendants in plea bargains, such as the rights to a trial by an impartial jury, the confrontation of one's accusers, and the privilege against self-incrimination, serve numerous important purposes, "one of which is to protect the defendant from overzealous and improper prosecution").

<sup>12</sup> For example, due process in criminal trials requires that defendants not proven guilty beyond a reasonable doubt not be punished; on the other hand, plea bargaining

system will remain in place so long as attorney negotiations without neutral oversight dominate the plea bargaining arena.<sup>13</sup> Given this reality, hope for the criminal justice system exists in the form of plea mediations. By imposing neutral oversight on the plea bargaining process, mediation can eliminate many of the current problems in the field caused by unsupervised negotiations, while also adding numerous procedural benefits.<sup>14</sup>

This Note examines the case for supplanting traditional plea bargain negotiations with plea mediations. Mediation can return fairness to the criminal justice system without sacrificing the benefits offered by the current system of plea negotiations. Part II illustrates the problems resulting from the negotiation process used to procure guilty pleas. Part III provides an overview of mediation, then highlights why it is a desirable alternative to negotiations in this context. Finally, Part IV concludes that mediation's benefits outweigh its potential efficiency costs (noting that the process will still be more efficient than a trial), and that, unlike plea negotiations, it is

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allows a sentence to be imposed on a defendant based on little more than a belief by the prosecutor that the defendant "is guilty and dangerous" and therefore not worthy of an acquittal, even though evidence substantiating this belief beyond a reasonable doubt may not exist. See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1405-06 (2003) (suggesting that a benefit to the plea bargaining process is that it allows defendants to receive sentences even when due process would otherwise free them from punishment).

Lynch suggests plea bargaining essentially creates a verdict of "more likely than not, but not certain, to be found guilty," which allows for the punishment of defendants with a lesser sentence than the offered maximum under a lower standard of proof. *Id.* at 1405. He suggests that this system is preferable both to prosecutors (who suspect that something criminal is afoot but do not think they can prove this suspicion beyond a reasonable doubt) and defendants (who may not want to risk the possibility of receiving a harsh sentence for the somewhat slim chance of receiving a full acquittal). *Id.* at 1406. While this rationale is attractive, it undermines traditional due process and the established standard of innocent until proven guilty beyond a reasonable doubt, the foundations of the American criminal justice system. See, e.g., Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 843 (1999) (describing "innocent until proven guilty beyond a reasonable doubt" as the "great first principle of American criminal procedure"). Thus, it is flawed as a justification for plea negotiations.

<sup>13</sup> See Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1139 (1998) ("As a process, plea bargaining lacks many of the building blocks of adversarial theory, including the presence of neutral and passive decision makers . . .").

<sup>14</sup> Mediation is, at its most basic level, a form of assisted negotiations, with the presence of a mediator included to facilitate settlement between the parties. See Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 964 (1998) ("Mediation is facilitated negotiation. In mediation[,] the parties retain the decision making authority and thus participate as negotiators in the mediation.").

both a fair and effective method of alternative dispute resolution for criminal cases.

## II. CURRENT PROBLEMS IN PLEA BARGAINING

Many problems currently existing in plea bargaining arise from three different events<sup>15</sup>: innocent defendants pleading guilty,<sup>16</sup> the presentation of unfair bargains,<sup>17</sup> and the absence of neutral oversight over the process.<sup>18</sup> All three can lead to a myriad of problems and are thus examined in turn.

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<sup>15</sup> This list is necessarily non-exhaustive, as there are numerous externalities that contribute to the current problems in plea bargaining. Rather than chronicling all of the flaws in the current criminal justice system, it contains only the most basic and obvious ones.

<sup>16</sup> See *supra* note 5 and accompanying text.

<sup>17</sup> While not all prosecutors will suggest patently unfair plea offers, the system can be easily manipulated by those who wish to do so. According to one author, "Prosecutors . . . know they can make anybody, even the innocent, plead guilty to crimes by simply piling on an overwhelming number of charges." Julia Robb, *Plea Bargains: Who Wins?*, DAILY TOWN TALK (Alexandria, LA), May 11, 2003, at 17A, available at LEXIS, News Library, Dlytlk File (quoting Paul Craig Roberts). However, Robb presents the opinions of others who feel that prosecutorial discretion in plea bargaining can be a good thing. *Id.* (citing George Higgins, a defense lawyer, who feels that some prosecutors will work with defense lawyers representing recalcitrant or otherwise reformed defendants to allow them to plead to a lesser offense and thus avoid the harsh mandatory sentence that would be imposed at trial).

<sup>18</sup> Instead of the traditional judicial presence to ensure fairness of procedure and accuracy of verdicts, plea bargaining focuses on the prosecutor as the central figure, giving a traditionally adversarial party immense, largely unregulated power. See Lynch, *supra* note 12, at 1403-04 ("[W]hat radically distinguishes [plea negotiations] from the adversarial litigation model . . . is that the *prosecutor*, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed)."). Thus, the current system is necessarily "an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor's office—in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker." *Id.* at 1404. Some commentators have noted the "apparent hypocrisy" that this situation creates:

The Constitution provides extensive constitutional safeguards for defendants who proceed to trial, but ninety percent of felony convictions occur without trial. The judiciary articulates great principles that govern the determination of guilt at trial, but then the executive branch, with the approval of the judiciary, bargains with criminals to purchase these procedural entitlements.

Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 770 (1998).

### A. Innocent Defendants Pleading Guilty

From a distance, it appears unthinkable that an innocent defendant would plead guilty to an offense that he did not commit. Why would an individual knowingly accept the blame, along with the accompanying penalty and social stigma, if he had nothing to do with the crime of which he is accused?<sup>19</sup> Though seemingly illogical, this occurrence is a common result of the current plea bargaining process and is one of the main arguments against the system.<sup>20</sup> As one commentator has noted, "An innocent defendant may plead guilty 'if convinced that the lighter treatment from a guilty plea is preferable to the possible risk of a harsher sentence following a formal trial.'"<sup>21</sup> Other writers have echoed this idea, believing that innocent defendants are motivated to avoid the most serious penalties facing them, preferring to go with a lesser, known penalty than a greater, unknown one.<sup>22</sup>

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<sup>19</sup> The answer is that defendants often feel compelled to accept a lesser punishment, given the odds that are generally against them being acquitted at trial. See Guidorizzi, *supra* note 18, at 771 ("The most serious concern with plea bargaining pertains to the possible coercion of innocent defendants to plead guilty.").

<sup>20</sup> See Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 571 (1996) ("Even innocent defendants may be willing to abandon their defenses if the stakes are high enough and the probabilities of conviction are great enough."); Kinsley, *supra* note 5, at 11A. However, legal commentators are split on this issue, with the main counterargument being that the number of innocent defendants oppressed by the criminal justice system is much lower than it is popularly made out to be. See F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 213 (2002) ("It is rare that defense counsel is confronted with the railroaded innocent defendant; most commonly, the defendant will be an individual who is guilty of the crime charged, or at least guilty of a crime substantially similar to the one with which he is charged.").

<sup>21</sup> Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 518 (1999) (quoting JOSEPH J. SENNA & LARRY J. SIEGEL, INTRODUCTION TO CRIMINAL JUSTICE 337 (2d ed. 1981)).

<sup>22</sup> See, e.g., Hessick & Saujani, *supra* note 20, at 201 ("[E]ven the innocent sometimes pleads guilty because the probability of conviction is great, fearing that if found guilty, he will face a heavier sentence than what he would have received had he entered a plea."); C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. 15, 17 (2003) (noting that "many defendants can be enticed to plead guilty, even though they are innocent, in order to avoid even more severe consequences of systematic error"); Sigman, *supra* note 11, at 1334 ("Plea bargaining eliminates the risk of a trial, where the outcome is indeterminate. Risk averse . . . defendants are the most likely parties to seek plea agreements."); Comment, *Constitutional Alternatives to Plea Bargaining: A New Waive*, 132 U. PA. L. REV. 327,

This occurrence is explained by the theory that factually innocent defendants are more risk-averse than factually guilty ones and willing to accept plea bargains because they offer more certainty than a trial.<sup>23</sup> This result is attractive in terms of negotiations, as both parties get what they desire from the encounter: The prosecutor gets a quick conviction,<sup>24</sup> albeit a baseless one, and the defendant gets a guaranteed, smaller sentence.<sup>25</sup> Traditional negotiations theory suggests that this is a win-win result, one which both parties should aspire to obtain.<sup>26</sup> Theoretically, each side got a portion of what it wanted from the encounter, so both should be satisfied with the result.<sup>27</sup>

Indeed, the innocent defendant may be pleased with the result, given the context. He may have accepted the inevitability that he will be held accountable for a crime that he did not commit, and similarly rationalized

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340 (1984) (“[T]hose who insist on a trial suffer substantially longer imprisonment than those who plead guilty.”) (quoting Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 15 (1982)).

<sup>23</sup> See Hessick & Saujani, *supra* note 20, at 201 (“[T]he innocent defendant is inherently more risk averse than the criminal because a criminal was willing to risk breaking the law in the first place.”); *see also id.* at 230 (“The inherent reduction of anxiety regarding one’s sentence provided by the plea alone may provide the necessary incentive for the risk averse defendant to plead.”). In addition, the innocent defendant may have a low opinion of the criminal justice system’s ability to determine the truth since it charged him of a crime that he did not commit. Therefore, such individuals are even less willing to risk the result of a trial than an actual perpetrator. *Id.* at 202.

<sup>24</sup> See Guidorizzi, *supra* note 18, at 770–71 (“The benefits of the certainty of conviction and the efficiency of process outweigh the cost for securing a conviction.”). This benefit is so strong that it overrides the fact that a lighter sentence was given to the defendant, a reality that many prosecutors have come to accept as necessary to achieve expedient convictions. *See id.* at 770. However, this tradeoff of quicker convictions for lesser sentences has angered many, who feel like criminals are “get[ting] away” with both doing a crime and receiving undeserved leniency. *Id.*

<sup>25</sup> See Lynch, *supra* note 12, at 1405 (“As compared with a jury trial, negotiated dispositions offer the related benefits of certainty and compromise, as opposed to the unpredictable all-or-nothing judgment of a trial.”).

<sup>26</sup> This type of agreement is technically reached after the invention of options for mutual gain, one of the four points to a successful negotiation established by two pillars of modern negotiation theory, Roger Fisher and William Ury. *See* ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 10–11 (Bruce Patton ed., 2d ed. 1991).

<sup>27</sup> According to Lynch, plea bargains are a way for both the prosecution and the defense “to avoid worst-case outcomes,” something that both obviously want to do. *See* Lynch, *supra* note 12, at 1405.



that taking the smallest penalty was the best way to minimize the harm done to him.<sup>28</sup> However, neither side truly gets what it wants in this situation. While the prosecutor procures a conviction, he has convicted the wrong person—the real criminal is still on the streets.<sup>29</sup> Likewise, the innocent defendant may perceive that he is getting a good deal, but the social stigma of being convicted of a crime is harsh, affecting his entire future, a fact that is not generally explained to deal-making defendants nor realized by first-time players in the system.<sup>30</sup> Thus, while plea negotiations produce a facially desirable result when an innocent defendant negotiates a guilty plea, the

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<sup>28</sup> Such defendants come to the unfortunate realization that their time, energy, and money will be better spent fighting a different battle. See Joseph S. Hall, Note, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1347 (1999) ("Knowing that their chances of winning suppression motions are small, and that the chances of a successful outcome at trial are small as well, the rational defendant will likely choose to plea bargain even if she is innocent, or at least not as culpable as the charged offense would indicate."). This willingness to plea bargain even in the face of innocence may be even more likely if defendants feel that there are several barriers to taking their case to court and proving their lack of culpability. See Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 871 (1998). Although this passage discusses mandatory mediation as an impediment to those seeking their day in court, the theory is important: "For those for whom adjudication is the desired model of justice, these barriers to access to justice in the courtroom are troubling." *Id.*

<sup>29</sup> See George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 23 (2000) ("We burden prosecutors with a presumption in favor of evidence because the costs of making a mistake about innocence are catastrophic."). Such a result is catastrophic because, when an innocent person is convicted, he is wrongfully deprived of his liberty, a value which is prized above all others in the American justice system, while the real criminal's acts go unpunished and he remains free to commit more crimes. Further, when a prosecutor uses his discretionary powers against an innocent defendant, he violates his duty to pursue and strive for the truth. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO J. LEGAL ETHICS 309, 313–14 (2001) ("[T]he prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes truth . . . [T]he prosecutor has the overriding responsibility not simply to convict the guilty but to protect the innocent.").

<sup>30</sup> See Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 209 (1998) ("A released convict may perceive further investment in human capital to be useless because he may understandably reason that sinking money and time into education and training will not overcome the stigma of a felony conviction on a job application.").

effects on both parties are undesirable in a system built on basic guarantees of fairness.<sup>31</sup>

### B. *The Presentation of Unfair Bargains*

The prosecutor dominates the current plea bargaining process: He determines which charges will be filed against a particular defendant, what deals will be offered, how much the deals can be altered, and whether or not defendants who do not plead will be prosecuted to the fullest extent of the law.<sup>32</sup> Such unfettered discretion undermines fairness, regardless of whether or not prosecutors abuse this privilege.<sup>33</sup> As one commentator has noted, "market analysis suggests that [prosecutors] will tend to depress price by offering smaller plea concessions, diminish the number of plea agreements offered, and discriminate against certain defendant classes. Defendants, both

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<sup>31</sup> This situation cannot be dismissed as an infrequent occurrence. One commentator concluded from a study of conviction rates in two specific federal districts that at least one-third of the defendants who pleaded guilty would have been acquitted if they had taken their cases to trial. Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 309–10 (1975). *But see* Bibas, *supra* note 6, at 1384 ("The criminal justice system probably does not charge and prosecute many innocent defendants.").

<sup>32</sup> See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1477 (1993) (labeling prosecutorial power in plea bargaining as absolute and "monopsonistic").

<sup>33</sup> Discretion is essential for the prosecutor to function effectively. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998) ("[P]rosecutorial discretion is necessary. It is difficult to imagine a fair and workable system that does not include some level of measured discretion in the prosecutorial process."). The key word is "measured"—enormous discretion, with little or no supervisory presence, is a breeding ground for corruption, regardless of who wields it. See generally Standen, *supra* note 32, at 1477–78 (describing how prosecutors will offer smaller plea concessions if unchecked). "The deficiency of prosecutorial discretion lies not in its existence, but the randomness and arbitrariness of its application . . . Self-regulation by prosecution offices is largely nonexistent or ineffective, and Supreme Court jurisprudence has protected prosecutors from both public and judicial scrutiny." Davis, *supra*, at 20–21. *But see* Jeffrey Standen, *An Economic Perspective On Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 255 (1998) ("Although the prosecutor does enjoy great latitude in charging and hence in structuring the parameters of the plea bargain and sentence . . . the prosecutor's selection is not unfettered. It is restricted by a judicial hearing over the guidelines sentence. But this restriction is limited.") (citation omitted).

individually and as a class, are unlikely to have any systematic defenses to this prosecutorial oppression."<sup>34</sup>

Possessing absolute power to control proposals, the benefits for their acceptance, and the consequences for their rejection offers prosecutors little incentive to engage in fair bargaining.<sup>35</sup> Because prosecutors enjoy essentially absolute control over the plea bargaining process, they will necessarily be disinclined to back off of their positions, whether they themselves are completely virtuous or wholly corrupt.<sup>36</sup> The defendant, on the other hand, must either accept what the prosecutor proposes or take his chances at trial,<sup>37</sup> where stiffer sentences are all but guaranteed.<sup>38</sup>

Plea bargaining in this situation is not an alternative method of dispute resolution where both sides work together to create the best agreement for all

<sup>34</sup> Standen, *supra* note 32, at 1478.

<sup>35</sup> See Standen, *supra* note 33, at 261 (noting that, because prosecutors have "unprecedented power" in plea negotiations, the motivation to exploit this power exists).

<sup>36</sup> Absent some desire to rise above the system to create an artificially level playing ground, the prosecutor has no motivation to make negotiations the fair process that they must be to remain effective. See Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 45 (1983) (finding that there is such a power disparity in plea bargaining that it is more like an administrative decision by the prosecutor than a negotiation). The intent in pointing out this power disparity is not to attack the institution of prosecution or individual prosecutors as a group. Rather, it is important to realize the full extent of the power disparity between prosecution and defense in the criminal system, and how this can be abused (or, at the very least, convey the general impression of unfairness to the system's participants and the general public). See Eric L. Dahlin, Note, *Will Plea Bargaining Survive United States v. Mezzanatto?*, 74 OR. L. REV. 1365, 1381-82 (1995) (describing how prosecutorial discretion in plea bargaining and sentencing has increased the power imbalance between prosecution and defense, to the point where prosecutors can wield broad coercive power against a defendant if they so desire). Such a divide is fatal to an effective system of negotiations, especially one focused on due process. See Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 5 (1992) ("Government actions that improve the balance of power provide due process. Government actions that create, entrench, or increase power disparities violate due process.").

<sup>37</sup> See Gifford, *supra* note 36, at 38-39 ("[T]here is little negotiable about pleading guilty; defendants simply choose between pleading guilty and getting mercy, or proceeding to trial and getting justice.").

<sup>38</sup> See *id.* at 46 ("The sentencing differential between defendants who are convicted at trial and those who accept the prosecutor's offer to plead guilty is so pervasive and so substantial that few defendants are foolhardy enough to risk testing the prosecutor's determination of the 'value' of their case."); see also Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 87 (1995) ("Trial judges send a similar message to defendants contemplating a trial: go to trial and if you lose, you will get a stiffer sentence.").

involved.<sup>39</sup> Rather, the prosecutor becomes the proverbial judge, jury, and executioner, imposing his will and desired sentence on the defendant, who is powerless to invoke the constitutional protections otherwise afforded him by the criminal justice system.<sup>40</sup> True negotiations cede to the prosecutor's monopolistic power in this arena.<sup>41</sup>

While such unchecked power is dangerous regardless of who wields it, it wreaks disastrous effects when the prosecutor is tainted by racial prejudices.<sup>42</sup> A racist prosecutor can use his advantage in the plea bargaining

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<sup>39</sup> See *Leading Cases*, 109 HARV. L. REV. 111, 258–59 (1995) (“According to the standard model, plea negotiations allow both sides to assess their respective chances at trial, so that they can come to a mutually beneficial trade. But the contracting analogy is imperfect when, because of information and power imbalances, the terms of the deal are so limited and the alternatives virtually nonexistent.”) (citation omitted).

<sup>40</sup> See Davis, *supra* note 33, at 25 (“Because prosecutors are arguably the most powerful decisionmakers in the process, their decisions potentially have the greatest discriminatory impact.”). Another concern is that prosecutors will engage in “ad hoc bargaining,” where they suggest deals that require a defendant to “perform an act, complete a program, or surrender a right” which may be in addition to or in lieu of a normal criminal punishment; in other words, the prosecutor suggests something that a judge would not be allowed to impose as a penalty upon the defendant at trial. Colquitt, *supra* note 5, at 711–12. Such deals can be “improper, illegal, or in violation of ethical creeds,” but there is essentially no oversight in the plea negotiation process to prevent them from being offered to and/or accepted by defendants. *Id.* at 710.

<sup>41</sup> See Standen, *supra* note 32, at 1480. The prosecutor who chooses to function outside the law has a wide variety of tools at his disposal that allow him to circumvent the truth he is bound to protect through unfair bargains:

A prosecutor may impede the truth-finding process in several ways: (1) distorting the truth by attacking the defendant's character, misleading and misrepresenting facts, and engaging in inflammatory conduct; (2) subverting the truth by making false statements and presenting false evidence; (3) suppressing the truth by failing to disclose potentially truth-enhancing evidence or obstructing defense access to potentially truth-enhancing evidence; and (4) other truth-disserving conduct that exploits defense counsel's misconduct and mistakes and prevents introduction of potentially truth-serving defenses.

Gershman, *supra* note 29, at 315 (footnotes omitted). This potential for unchecked abuse perverts the fairness necessary to ensure the trustworthiness of any system of alternative dispute resolution. See, e.g., McEwen & Williams, *supra* note 28, at 878 (“Mediation is not a fair process when strong settlement pressures effectively remove a disputant's choice of whether or not to settle.”).

<sup>42</sup> Because of the immense, often unchecked discretion that prosecutors possess, it is easy for one tainted by racial animus to take advantage of the system and further his racist aims without detection. See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 647 (1998) (“[I]f racist prosecutors exercise some caution and judgment, it will be difficult to detect their racially

process to systematically oppress minority defendants, locking up convictions with minimal efforts to prove his case.<sup>43</sup> This use of prosecutorial power chills minority defendants' decisions to go to trial, as they fear that the system is inevitably stacked against them regardless of their innocence or guilt.<sup>44</sup> Too often, they take the lesser punishment, even if it is an unjust one.<sup>45</sup> The immense prosecutorial discretion in the plea bargaining process allows for the introduction of personal biases upon the criminal population without the hindrance of superseding authority from a judge or jury.<sup>46</sup>

Negotiations are fruitless when one party holds all the bargaining power, as agreements cannot truly be reached jointly.<sup>47</sup> As one commentator

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selective prosecution.""). This observation is not to suggest that prosecutors as a group are racist, or even that racist views pervade the position, but merely that the great power afforded by the position is easily manipulated by a racist prosecutor. However, the occurrence of this problem may be decreasing. See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998) ("[W]hite police officers (and white legislators, prosecutors, and judges) are surely less racist as a class than they were twenty or thirty years ago.") (emphasis omitted).

<sup>43</sup> See Adina Levine, *A Dark State of Criminal Affairs: ADR Can Restore Justice to the Criminal "Justice" System*, 24 HAMLINE J. PUB. L. & POL'Y 369, 392 (2003) ("In the present plea bargain process, racial bias has a prime opportunity to arise due to the broad discretion afforded prosecuting attorneys in choosing the plea bargain to offer a particular defendant. The current process of plea-bargains thus leaves much room for personal, and cumulatively, systematic racial bias.").

<sup>44</sup> See Uphoff, *supra* note 38, at 82.

<sup>45</sup> See *id.* at 82–83.

<sup>46</sup> See Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1240–41 (1999) (listing several factors left to the discretion of prosecutors to consider in formulating plea bargains, including the seriousness of the offense, the defendant's prior criminal record, the victim's interest in prosecution, the strength of the evidence in the case, and the availability of possible rehabilitative or restitutionary sentences, all of which can and have been impacted by racism). Alfieri finds that these factors, which are supposed to be considered impartially, "muster only the pretense of race-neutral prosecutorial discretion." *Id.* at 1241; see also Davis, *supra* note 33, at 32 (suggesting prosecutors often discriminate against minority defendants and victims, though sometimes unconsciously). Davis recounts witnessing this discrimination routinely while practicing in the racially-tinted criminal justice system in Washington, D.C. *Id.* at 15–16 (recounting 12 years of experience spent as a public defender in Washington, D.C., wherein she observed disparate impact based on the race of the defendant at the charging, plea bargaining, trial, and sentencing phases of criminal cases).

<sup>47</sup> See Davis, *supra* note 33, at 25 ("[T]he plea bargaining process is controlled entirely by the prosecutor and decisions are entirely within her discretion . . . . While the defense attorney may attempt to negotiate the best possible offer, the decision is ultimately left to the prosecutor's discretion."). Further, at the plea bargaining stage,

laments, "In a world without a judge, a prosecutor can diminish the price of plea bargains at will."<sup>48</sup> With such unequal bargaining power and no force overseeing the process, plea bargains are dangerously susceptible to becoming a defendant's surrender to the system, not his acceptance of guilt.<sup>49</sup> As such, prosecutorial discretionary power must be limited to make the plea bargaining process a fair and reliable form of dispute resolution.<sup>50</sup>

### C. *The Absence of Neutral Oversight*

In the criminal justice system, the judge functions as "a check on procedural injustice," a force that prevents the state from using its immense power to railroad defendants.<sup>51</sup> When this force is removed from the process, prosecutorial power becomes essentially limitless,<sup>52</sup> denigrating the fairness of plea bargain negotiations.<sup>53</sup> However, as two commentators have suggested, "While efficiency and speed are ideals that judges should aspire to in managing their respective courtrooms, our Constitution's promise of due process should take precedence over administrative convenience."<sup>54</sup> The

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prosecutors have "the most independent power and control," with "the least opportunity for counterbalancing input from the defense." *Id.*

<sup>48</sup> Standen, *supra* note 32, at 1480.

<sup>49</sup> See generally *Leading Cases*, *supra* note 39, at 256–57 ("The global critique of plea bargaining is that it is inherently coercive—that the deals offered to criminal defendants are Faustian bargains, and that the process by which constitutional rights are relinquished under threat of severe penalties is inimical to the truth-seeking function and the civic value of public trials.") (citations omitted). It is important to note that this critique does not demand an end to all plea bargaining, but rather a reformation of the current system—"[o]ne does not have to reject the plea bargain altogether . . . to argue against structuring the bargaining process in a way that creates more coercion." *Id.* at 257.

<sup>50</sup> See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 601 (1997) ("Certainly any attempt to regulate plea bargaining requires regulating prosecutorial discretion in general . . .").

<sup>51</sup> Hessick & Saujani, *supra* note 20, at 229.

<sup>52</sup> See *id.* at 230 (asserting that the removal of the neutral judicial force from plea negotiations increases the disparity in bargaining power between the prosecution and the defense).

<sup>53</sup> See generally *id.* at 231 (contrasting the judge's role as a seeker of truth with the prosecutor's as a seeker of punishment). Because the judge's role is virtually nonexistent at the bargaining stage of plea negotiations, the prosecutor's role dominates, changing the criminal justice system's focus from a pursuit of truth to a pursuit of punishment. See Davis, *supra* note 33, at 25.

<sup>54</sup> Hessick & Saujani, *supra* note 20, at 231.

judge as a neutral force prevents prosecutorial overreaching, enforces fairness of procedure, and, either by himself or with a similarly neutral jury, makes an impartial decision of guilt.<sup>55</sup> Without this presence, the vast majority of defendants have their cases resolved<sup>56</sup> without any neutral presence to temper the adversarial nature of this process.<sup>57</sup> Negotiation in the

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<sup>55</sup> Judges are specifically trained to uphold the ideals of equality and fairness, despite the fact that they are employed by the same entity that pays the prosecutors (the government); prosecutors, while trained to prosecute only those deserving it, are not as impartial and thus less suited to perform the judge's oversight role over the plea bargaining process. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 933 (1983) (stating that plea bargaining makes "figureheads of judges, whose power over the administration of criminal justice has largely been transferred to people of less experience, who commonly lack the information that judges could secure, whose temperaments have been shaped by their partisan duties, and who have not been charged by the electorate with the important responsibilities that they have assumed").

<sup>56</sup> See Uphoff, *supra* note 38, at 77 (stating that the vast majority of cases are resolved through plea bargaining).

<sup>57</sup> State and federal criminal justice systems typically require judicial approval of plea bargains for the agreements to formally take effect. See, e.g., FED. R. CRIM. P. 11(b) (listing information that a judge must read to a defendant before he accepts a plea bargain); *Michigan v. Rodriguez*, 480 N.W.2d 287, 290 (Mich. Ct. App. 1991) ("[T]he trial judge . . . possesses an obligation to ensure that the agreed-upon disposition will serve the interests of justice. If the judge finds the agreement is not tailored to reflect the particular circumstances of the case or the offender, the judge may reject the bargain."). However, this process is seldom a verification of truth by the judge, resembling more of an assembly-line litany of standard "yes" and "no" answers given by a pre-coached defendant. See, e.g., Davis, *supra* note 33, at 24-25 ("Although the judge must approve plea bargains in most jurisdictions, judges routinely approve these agreements because they expedite the process by disposing of criminal cases without the time and expense of a trial."); see also Dubber, *supra* note 50, at 552 (declaring that one of the "most disturbing defects" of plea bargaining is the public colloquy by the judge to approve the plea, dubbing it a "carefully rehearsed charade during which the participants merely enact a script that was carefully crafted in the backroom of the prosecutor's office"); Halberstam, *supra* note 22, at 33-34 (noting that the requirement of judicial satisfaction with the plea bargain is usually accomplished by the judge asking the defendant if he is guilty of the charges put forth against him by the prosecution). However, "[s]ince the defendant has generally been instructed on what he must say if he wishes the court to accept the plea and implement the 'bargain,' his replies at this point do not provide reliable assurance of guilt." *Id.* at 34; see also Dubber, *supra* note 50, at 599 ("Plea hearings today are too perfunctory to ensure that even minimal voluntariness requirement[s] for pleas has been met. They also fail to ensure that the defendant in fact did what she claims to have done by pleading guilty."). But see *id.* (noting that "not all jurisdictions require the court to establish a factual basis for the plea," so the judicial

shadow of such a system denies defendants the due process of the law; they must accept the prosecutor's judgment of their case through the offered plea bargain or face the utter certainty that they will receive a harsher sentence at trial.<sup>58</sup>

The everyday application of plea negotiations to the criminal justice system has not created a just alternative method of case resolution.<sup>59</sup> By removing procedural impartiality, this process has destroyed the safeguards of due process and, in doing so, has placed criminal defendants seeking a fair adjudication of guilt at an immediate disadvantage.<sup>60</sup> While negotiations in this context have made the system more efficient,<sup>61</sup> neutrality cannot be abandoned in a situation where individuals' basic freedoms are at stake. Due process requires a higher standard for the criminal defendant, who, it must be remembered, is presumptively innocent until proven guilty beyond a reasonable doubt.<sup>62</sup> Using a flawed system of plea negotiations to procure guilty pleas shows that this lofty, foundational ideal has been forgotten. As such, this practice must be reworked to restore, at the very least, basic fairness to the criminal justice system.

### III. APPLYING MEDIATION TO PLEA BARGAINING

Completely abandoning the practice of plea negotiations would likely have a devastating effect on the criminal justice system, unless it was immediately replaced by a more effective program.<sup>63</sup> While efficiency in this

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hearing stage may not be as important to the fair administration of justice in plea bargaining as some commentators make it out to be).

<sup>58</sup> See *supra* note 38 and accompanying text.

<sup>59</sup> Instead, it has removed the base protections afforded to criminal defendants in the name of efficiency and increased convictions. See Alschuler, *supra* note 55, at 933–34 (“The practice of plea bargaining is inconsistent with the principle that a decent society should want to hear what an accused person might say in his defense—and with constitutional guarantees that embody this principle and other professed ideals for the resolution of criminal disputes.”).

<sup>60</sup> See Guidorizzi, *supra* note 18, at 770 (discussing how plea bargaining undercuts the constitutional safeguards afforded to criminal defendants, as they are generally only available at trial but most cases are settled before they reach that point).

<sup>61</sup> See *infra* note 67 and accompanying text.

<sup>62</sup> This mantra is the foundation of the American criminal justice system. See, e.g., CAL. PENAL CODE § 1096 (Deering 2004); OHIO REV. CODE ANN. § 2901.05(A) (West 2003).

<sup>63</sup> It is generally accepted that without plea bargaining or a similar system that reduces the demand for full scale criminal trials, the criminal justice system would be unable to function effectively, or even at all. See Halberstam, *supra* note 22, at 35–36.



area should not be prized over due process of the law,<sup>64</sup> it is a goal that should be aspired to nonetheless.<sup>65</sup> Plea negotiations meet this objective admirably.<sup>66</sup> However, the use of mediation instead of negotiation to form plea agreements could achieve the aims of efficiency while simultaneously providing the system with much needed procedural fairness.<sup>67</sup> This section will present an overview of the benefits of mediation and then apply them as a means to ameliorate the injustices currently being inflicted upon the criminal justice system by plea negotiations.

## A. An Overview of Mediation and Its Benefits Over Negotiation

Mediation is an alternative dispute resolution procedure designed to offer an inexpensive, expedient, and relatively peaceful resolution to a legal dispute.<sup>68</sup> Often used in lieu of litigation in the civil arena, it aids parties in creating agreements tailored to their individual interests using procedures

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<sup>64</sup> See Alschuler, *supra* note 55, at 937–38 (summarizing several Supreme Court cases stating that the fundamental principles of law should not be compromised in the name of efficiency, even when congested schedules severely limit the timely and effective functioning of the courts); Bibas, *supra* note 6, at 1382 (“Efficiency is a value in criminal procedure, but it is not the only nor even the most important value. More important is the system’s accuracy . . .”).

<sup>65</sup> By some estimates, lowering the amount of guilty plea bargains by even a small amount would multiply the amount of time and resources needed for the criminal justice system to function effectively. See Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) (finding that a reduction of plea bargains from ninety to eighty percent of criminal convictions in this county would require twice as many resources as the system currently uses, and that a further reduction from eighty to seventy percent would triple the current amount used). But see Alschuler, *supra* note 55, at 938 (criticizing Burger’s estimates as hyperbolic). If Chief Justice Burger’s information is accurate, though, the need for speed and efficiency in the pleading process is clearly of paramount importance if the modern criminal justice system is to be effectively maintained.

<sup>66</sup> See Bibas, *supra* note 6, at 1362 (stating that one of the standard defenses of plea bargaining is that it saves time and money for already over-burdened courts).

<sup>67</sup> See *infra* Part III.B.2.

<sup>68</sup> See Major Sherry R. Wetsch, *Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys*, 2000 ARMY LAW., June 2000, at 8; see also Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 280 (1996) (“Nothing that occurs during the proceeding is designed to intimidate, only to heal. All parties are winners when a case is settled. In this kinder and gentler setting, violent, vindictive disputes can be calmed, allowing reason to prevail.”)

that are more flexible than those seen in the traditional rules of court.<sup>69</sup> Because these agreements take into account what each party wants from the encounter, mutually acceptable agreements are created, thereby increasing party satisfaction with the dispute settlement process.<sup>70</sup>

There are a variety of styles of mediation, with facilitative and evaluative being the most recognizable.<sup>71</sup> Procedurally, the benefits of mediation in the plea bargaining context are best visualized in largely facilitative mediation,<sup>72</sup> which involves the use of a neutral mediator who oversees the bargaining process without imposing his opinions on the parties.<sup>73</sup> The mediator is present during party meetings and assists the parties in facilitating

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<sup>69</sup> See Wetsch, *supra* note 68, at 8; see also Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 278 (1996) ("A perceived advantage of mediation is that it makes possible creative settlements . . . . This gives mediation a flexibility which is absent in litigation or arbitration.").

<sup>70</sup> See Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 59 (2002) (finding that mediation aids "negotiating parties in reaching mutually acceptable terms of settlement"). Further, because these agreements "bear the parties' own imprint[,]" they are far more likely to be adhered to than those imposed by a court." *Id.* at 61.

<sup>71</sup> See, e.g., Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 709-15 (1997). The facilitative style of mediation bred a third major style, "transformative mediation," popularized by Robert A. Baruch Bush and Joseph P. Folger. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81-95 (1994).

<sup>72</sup> Evaluative mediation, while also quite popular, poses the risks of maintaining the adversarial entrenchment of positions currently plaguing plea negotiations, while also imposing a mediator's potentially questionable evaluation of the situation onto the parties. This process can then lead to "heavy-handed pressure tactics" by the party favored by the mediator and perhaps even the mediator himself. See John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 326 (2000). In fact, pure evaluative mediation could be even more dangerous in the current situation than unsupervised negotiations; the mediator could essentially act as a surrogate judge, without the bounds of due process placed upon his action, and potentially without having undergone the legal training of the attorneys participating in the mediation. See *id.* ("Thus, having mediators evaluate—and especially when they forcefully press those evaluations on the disputants—creates a risk of manufacturing injustice if the mediators' predictions are incorrect."); see, e.g., Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers, and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 271 (2002) (relating a recent case from Virginia where a non-lawyer mediator gave legal opinions and legal analysis for a client, although in this case the mediator was later convicted of engaging in the unauthorized practice of law) (citation omitted).

<sup>73</sup> See Imperati, *supra* note 71, at 709-15; Wetsch, *supra* note 68, at 8.

communication, thereby focusing their efforts on resolving the problem at hand and persuading them to reach a mutually acceptable solution.<sup>74</sup> However, the facilitative mediator does not generally create possible agreements on his own and present them to the parties; he merely shapes their bargaining dialogue in a constructive manner so that the parties can reach a consensual decision on the dispute at issue in the case.<sup>75</sup>

A mediator brings numerous skills to the bargaining table that the parties may lack or choose not to exhibit on their own in a negotiation setting.<sup>76</sup> Trained mediators aid healthy communication by listening to each side's positions and interests, observing relevant non-verbal communications, and helping parties truly hear what each side is stating.<sup>77</sup> Mediators can also keep false or misunderstood information from disrupting discussion by questioning positions to test their strength and relevancy (a practice known as reality testing), summarizing statements made for clarity and understanding, acknowledging justifiable positions, and re-framing issues that might be unclear or that may have been led off-course during the mediation session.<sup>78</sup>

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<sup>74</sup> See Marfice, *supra* note 70, at 59.

<sup>75</sup> See *id.* at 60 (noting that, by serving this function, the mediator ensures that "[a]n agreement reached by the parties is . . . based on the decisions of the parties, and not the decisions of the mediator") (quoting Idaho R. Civ. P. 16(k)(1)); see also Wetsch, *supra* note 68, at 8 ("Mediators do not decide who is right or wrong. Instead, they help the parties reach a solution on their own that works for them."). Occasionally, though, a mediator will interject a possible solution if it may help the parties come to a desired agreement. See *id.* at 9 ("Sometimes a mediator will make recommendations to assist the parties in reaching their own agreement. The recommendations are often creative, collaborative solutions to problems that go beyond the mere exchange of money.").

<sup>76</sup> Highly skilled mediators will use their abilities to facilitate agreement and the settlement of disputes among parties, resolving impasses that had previously stalled negotiations. See Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 245 (2002) ("One of the reasons to use mediation is that a skilled neutral can enhance the quality and quantity of information brought to bear in a settlement attempt. This information, in turn, can improve the chances that the parties will reach an acceptable resolution to their dispute.").

<sup>77</sup> See Pyles, *supra* note 69, at 277-78; see also Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 9-12 (1996) (applying Bush's terminology, the mediator can eliminate cognitive barriers between the parties).

<sup>78</sup> See Pyles, *supra* note 69, at 277-78; see also Bush, *supra* note 77, at 8-9 (using Bush's wording again, the mediator can eliminate strategic barriers between the parties). Although the pure facilitative mediator is not supposed to engage in evaluative behavior, some of these admittedly evaluative activities are essential to the good facilitative mediator's toolbox, and may be used to reach a better result for the parties' case. See

Further, they ensure that disputes are settled in a peaceable, constructive manner by managing conflicts in discussions, helping parties vent their emotions,<sup>79</sup> regulating the bargaining procedure, and encouraging positive, problem-solving thinking in the pursuit of an agreement.<sup>80</sup> To properly frame the bargaining process, a mediator may also encourage parties to consider the consequences of not reaching an agreement, which prevents surprise and the imposition of an unexpected penalty on one side if there is a failure to settle.<sup>81</sup>

The presence of a mediator with these skills results in a mutually agreeable process, especially considering that clients can attend and participate in mediations, which may not always be true in plea negotiations.<sup>82</sup> With clients involved, understanding and fairness are of paramount importance, because, through those norms, the client will be better informed and ready to make an intelligent decision as to the result of the agreement.<sup>83</sup> Likewise, in a fair and balanced mediation session, the

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Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 79–80 (1998).

<sup>79</sup> See Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 703 (2001) (discussing the mediator's tools that let them diffuse hostilities between parties that cause irrational decisionmaking).

<sup>80</sup> *Id.* This list of skills is by no means dispositive; mediators often bring all of these skills and more to the bargaining process. For example, experienced mediators may also aid parties in identifying issues that are of varying importance (greatly important to one party and not important at all to another). See Wetsch, *supra* note 68, at 9. In pointing out this type of situation, a mediator prevents one side from taking unfair advantage of a throwaway position, leading to a fairer, "win-win" agreement. *Id.*

<sup>81</sup> See Marfice, *supra* note 70, at 60.

<sup>82</sup> See *id.* at 61 ("The mediation process is valuable because it brings the client along in the process of negotiation and evaluation and helps the client gain a better understanding of the case."); see also Bush, *supra* note 77, at 22–23 (summarizing a study in which lawyers preferred mediation over unassisted negotiations because, among other reasons, "it increases clients' sense of participation in and control over their case, which is frequently attenuated in lawyer-lawyer negotiation") (citing Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1381 (1995)).

<sup>83</sup> See Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 106 (1997) ("The main focus of the mediation is the parties' subjective conceptions of fairness."); see also John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 118 (2002) ("Parties are more likely to feel satisfied with mediation when they feel that they have opportunities for meaningful self-expression and participation in determining the outcome. Parties are also more satisfied when they believe that the

clients "can and do discuss and explain needs and problems and express anger and disappointment . . . , not just exchange demands and positions . . . ." <sup>84</sup> More importantly, mediating parties feel that both another person in general and the other party in particular have heard their side of the story, which is essential for healthy, productive communication. <sup>85</sup> In short, clients in mediation can express themselves and their positions to the opposing party through the assistance of a neutral third party (allowing them to be satisfied that their side has been fully explained and heard), while also learning why the other side espouses its chosen position. <sup>86</sup>

The mediation process is one of open and constructive communication, and thereby one more amenable to constructive dispute resolution. <sup>87</sup> In so

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mediation process is fair, understandable, informative, attentive to their interests, impartial, uncoerced, and private.") (citation omitted); Matt Wise, *Current Public Law and Policy Issues in ADR: Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4*, 22 HAMLINE J. PUB. L. & POL'Y 383, 421 (2001) (explaining the importance of fairness in mediation, and its component that all parties involved understand the "aspects of the decisionmaking process, including their right to withdraw consent and discontinue negotiation, and that they understand the outcome reached in mediation.") (quoting Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775, 787-88 (1999)).

<sup>84</sup> See Bush, *supra* note 77, at 23 (quoting McEwen et al., *supra* note 82, at 1382-83).

<sup>85</sup> See *id.*

<sup>86</sup> One of mediation's most attractive features, and perhaps its most important benefit over negotiations, is that it places mutual understanding and expression of positions at the forefront of dispute resolution, regardless of the parties' bargaining power. See Robert Gatter, *Unnecessary Adversaries at the End of Life: Mediating End-of-Life Treatment Disputes to Prevent Erosion of Physician-Patient Relationships*, 79 B.U. L. REV. 1091, 1115 (1999) ("[M]ediation requires disputants to explain their positions so that each may understand the other. Because mediation resolves disputes through mutual agreements, disputants have an incentive to persuade the other by explaining her or his position."); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 857 (2003) (explaining that mediation gives parties a chance to explain their positions, express their feelings, and vent their pent up frustration, anger, and disappointment, which, ultimately, gives them a better understanding of each other).

<sup>87</sup> Through an open and honest process of mutual understanding, parties begin to realize what agreements are best suited for both themselves and the other party. See Adam Lamparello, Note, *Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating "Crimes of Addiction,"* 16 OHIO ST. J. ON DISP. RESOL. 335, 379 (2001) ("By fostering a climate of open communication and collaborative participation, mediation can inherently produce an increased sense of *respect* among the parties . . . . By working together, the possibility that parties will fashion a mutually

structuring settlement agreements, mediation, as one commentator summarizes, offers a "twofold, qualitative improvement" over the negotiation process.<sup>88</sup> First, it allows parties to influence and, ultimately, create the eventual agreement arising from the process, leading to mutually beneficial and acceptable agreements that clients feel represent their individual needs and desires.<sup>89</sup> Second, the character and quality of communication in the dispute resolution process is increased, allowing more expression of emotions and lessening the possibility of misunderstandings distorting potential agreements.<sup>90</sup> Given these qualities, mediation offers an unbiased method of resolving disputes that focuses on enriched party communication and true assent to agreement,<sup>91</sup> not just which party can subvert the other to its will. As such, it is preferable to negotiations if it can be effectively integrated as a means to settle disputes in the criminal arena.<sup>92</sup>

### B. Supplanting Negotiation with Mediation in Plea Bargaining

Meditation can ameliorate many of the problems associated with the use of negotiations in the criminal justice system through the neutral oversight

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acceptable and beneficial solution will be enhanced."); Gary D. Williams, Note, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation*, 16 OHIO ST. J. ON DISP. RESOL. 819, 829 (2001) ("[M]ediation encourages the parties to communicate actively. Such open communication empowers the parties to resolve potential misunderstandings and narrow the focus on the issues in dispute.").

<sup>88</sup> Bush, *supra* note 77, at 27.

<sup>89</sup> *Id.* This benefit is of enormous importance not just to the dispute resolution process but also to the client's psyche. "People value the experience of self-determination. They believe they know what is best for themselves and they want the opportunity to effectuate it, in conflict as in other aspects of their lives." *Id.* at 28.

<sup>90</sup> *Id.* at 28. "In simple terms, conflict leads disputants to demonize each other, and mediation 'de-demonizes' people to one another." *Id.*

<sup>91</sup> See Glenda L. Cottam, *Mediation and Young People: A Look at How Far We've Come*, 29 CREIGHTON L. REV. 1517, 1518 (1996) ("Mediation often leads to agreements that satisfy all of the parties and are fair and acceptable over time."); Dane E. Gaschen, Note, *Mandatory Custody Mediation: The Debate Over Its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469, 483 (1995) ("Mediation reduces conflict and fosters a commitment to the successful implementation of an agreement.").

<sup>92</sup> See Jonathan Hyman, *Slip-Sliding into Mediation: Can Lawyers Mediate Their Clients' Problems?*, 5 CLINICAL L. REV. 47, 56 (1998) (stating that, "[s]tanding apart from the negotiation game, the mediator is not hobbled by the negotiators' need to act in a strategically sensitive manner." Rather, "by having neither her own nor her client's needs at stake, the mediator can avoid the optimistic tinge and self-serving misperception that inevitably influences how one understands important things.").

offered by a trained mediator.<sup>93</sup> By utilizing plea mediations instead of plea negotiations, the system could reap the benefits of enhanced communication overseen by a neutral presence employed specifically to lead the parties toward a mutually agreeable disposition.<sup>94</sup> Such a mediated plea agreement system would improve the criminal justice system in numerous ways and add several benefits not currently offered.

### 1. *Alleviating the Pressure on Innocent Defendants to Plead Guilty*

Mediation can overcome one of the major flaws arising from plea negotiations—innocent defendants pleading guilty—by attacking two roots of the problem: poorly performing defense attorneys and a lack of mutual understanding between the parties. Innocent defendants may plead guilty because they are risk averse and see no other way to escape what they perceive as an unjust system than to plead to whatever deal the prosecutor offers them.<sup>95</sup> Defense attorneys' personal motivations often play a large role

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<sup>93</sup> See Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 316 (2002) (finding that mediation can overcome the deficiencies of negotiation, namely a lack of trust and cooperation, through the presence of a facilitative neutral party).

<sup>94</sup> See *id.*; see also Levine, *supra* note 43, at 399 (discussing these potential benefits and plea mediation's general superiority over plea negotiation to both improve the process as a whole and remove racial bias from it in particular). However, some commentators feel that mediation's focus on resolving past conflicts and building future consensus is particularly unsuited to at least some crimes like domestic violence, where punishment is needed to put an offenders in his proper places. See, e.g., Alana Dunnigan, Comment, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031, 1052 (2003) ("Mediation does not care about attaching blame; it just looks to future solutions. Thus, mediation not only assures that the abuser's actions will go unpunished and unaccounted for, it also perpetuates the privatization of a problem that has traditionally been kept out of the public consciousness.").

These concerns are assuaged by a system that looks not to forgive and forget without punishment, but rather to punish appropriately. Mediation, in this context, is a vehicle for making the process fair for defendants (similar to criminal trial procedure), not one for absolving them of all responsibility for their actions. See Nancy Lucas, Note, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365, 1397 (2001) (noting that, in the similar process of victim-offender mediation, "[a]n essential aim . . . 'is to send a clear message to the offender that his actions have consequences, that he has wronged another human being, [and] that he is responsible for his actions . . .'").

<sup>95</sup> See *supra* Part II.A.

in the defendant's decision to plead in such a manner, for a variety of reasons. Public defenders may have an enormous caseload that pressures them to deal quickly, with little time to formulate adequate defenses.<sup>96</sup> Private attorneys may be motivated by their own concerns in pursuing plea agreements as well, seeking to bargain in numerous cases to make a quick profit with minimal effort expended.<sup>97</sup> Both public and private defense attorneys may also push their clients to plead in an effort to gain favor with prosecutors and other court personnel.<sup>98</sup>

Unfortunately, these failings by defense attorneys injure defendants immensely in the largely unstructured and unregulated format of negotiations.<sup>99</sup> Without a neutral supervisory presence, unethical behavior is nearly impossible to detect.<sup>100</sup> Because of this problem, zealous advocacy is compromised and innocent defendants are injured the most. They lose trust in their attorneys<sup>101</sup> and begin to feel forced into accepting the offered deals.<sup>102</sup> Guilty pleas too often result from this fatal flaw of negotiations.<sup>103</sup>

Likewise, the plea negotiation process can compel innocent defendants to plead guilty because they do not have the chance to explain themselves to the

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<sup>96</sup> See Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 LAW & SOC. INQUIRY 927, 952 (1997) (finding that public defenders assume a "passive, reactive posture," making them less likely to discover "viable defenses" and thus, presumably, more likely to accept a prosecutor's plea offer); Hall, *supra* note 28, at 1332 (noting that public defenders often do not have the time or the resources to effectively advocate for a defendant at trial, and other political and institutional pressures on the attorneys often cause them to advocate plea bargains, even if the defendant has a good defense or is innocent); Hessick & Saujani, *supra* note 20, at 208-09; Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 128 (1997); Uphoff, *supra* note 38, at 78-79.

<sup>97</sup> See Hessick & Saujani, *supra* note 20, at 208; Hollander-Blumoff, *supra* note 96, at 128-29; Gifford, *supra* note 36, at 50.

<sup>98</sup> See Hessick & Saujani, *supra* note 20, at 210.

<sup>99</sup> See Marcus, *supra* note 8, at 1210-11.

<sup>100</sup> See *id.*

<sup>101</sup> See Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 87 (2001).

<sup>102</sup> See *id.* at 88; Uphoff, *supra* note 38, at 80 (suggesting that a client who does not trust his lawyer will be more inclined to plead guilty than one who displays such trust).

<sup>103</sup> See *supra* notes 7-8 and accompanying text; see also Uphoff, *supra* note 38, at 78 ("[U]ndoubtedly . . . there are criminal defense lawyers of limited ability, zeal or professional commitment who do manipulate their clients into ill-advised plea bargains.").



prosecutor, and thus feel that their stories are not truly heard.<sup>104</sup> Due to this lack of mutual understanding, they must rely on their attorneys to zealously present their cases to the prosecutors.<sup>105</sup> However, the trust in one's attorney necessary for the defendant to feel comfortable with the plea negotiation process is too often diminished; defendants in this situation feel abandoned in the system, and plead guilty in situations where they may not otherwise be willing to do so.<sup>106</sup>

Neutral oversight from a professional mediator would largely eliminate these problems from the plea bargaining process. First, it would require each defense attorney to come to the mediation session with his client, giving the client a direct view into the efforts that his attorney is making on his behalf.<sup>107</sup> Second, the mediator can hold the defense attorney accountable for a lack of preparation, ensuring that he at least make a reasonable effort to represent his client through mediation's good faith norm.<sup>108</sup> This presence

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<sup>104</sup> See Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 366–67 (1994) (detailing the delay and inefficient procedures that can occur if there is a lack of mutual understanding between defendants and other actors in the criminal justice system).

<sup>105</sup> Unfortunately, defendants cannot always rely on their attorneys to present their cases at such a high degree of proficiency, given the relatively limited procedural checks on defense attorney performance in plea negotiations. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 799, 801 (1991) (noting the “virtual nonexistence of effective means to monitor counsel’s loyalty and performance in the low-visibility plea negotiation setting”).

<sup>106</sup> See *supra* notes 101–02 and accompanying text.

<sup>107</sup> The attorney's presence is necessary to ensure that strict evidentiary rules against admission of statements made in plea bargaining are adhered to by all parties involved should the mediation fail and the case proceed to trial. See FED. R. EVID. 410 (barring statements made in plea discussions unless a guilty plea results from them). However, in other legal arenas where mediation is used, attorney presence appears to be optional. See Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIM. LAW. 353, 363 (1997).

<sup>108</sup> Good faith would require that the attorney make a reasonable effort to represent his client in mediation; unfortunately, such accountability is not strongly in place at the present time, especially when public defenders are involved. See Felice Kirby et al., *Needed: A Community Experiment in Problem-Oriented Justice*, 20 FORDHAM URB. L.J. 431, 431 (1999) (“First, there’s the matter of finding and affording a lawyer who will prepare and coherently present the defendant’s case. Most likely the case will be plea-bargained, because an overwhelmed and underpaid public defender is unable to mount a credible defense . . .”) (citation omitted).

alone should force attorneys to pay attention to their client's needs instead of their own.<sup>109</sup>

Further, even if the attorney is not prepared, the client can advance his case,<sup>110</sup> offering information that could, with the mediator's assistance, cause an overzealous prosecutor to reconsider the merits of his case.<sup>111</sup> A prosecutor is not just interested in procuring a conviction, but rather in convicting the proper person; otherwise, the crime goes unsolved and the innocent defendant suffers a grievous wrong.<sup>112</sup> Mediation is particularly well suited to airing the client's concerns and positions, giving him a chance to aid his own case, even if his attorney will not.<sup>113</sup>

This ability to speak on one's own behalf sets mediation apart from negotiations in the criminal justice system, and, if nothing else, gives

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<sup>109</sup> Through a positive, calming influence, a mediator can bring an attorney to focus on his client's case, which he might otherwise be unwilling or unmotivated to do. *See* Calkins, *supra* note 68, at 298 ("Ultimately, by remaining calm and patient, the mediator will gain the confidence of the attorney and the latter will stop wasting time and money, and instead support the process."). Further, mediation presents a means for lawyers and clients to work together to reach the best solution for the client's problem in a way that unilateral negotiation fails to do:

If clients are to fully participate in decisions, and experience the moral development that we feel is an important part of the attorney-client relationship (or the autonomy that others feel is at the heart of it), lawyers must be careful not to announce and insist on their perception of justice . . . . The client must be a partner.

It can be no surprise that mediation is a natural way to continue, this time with the persons with whom the client has his problem, the very dialogue that the lawyer has initiated with his client.

Burns, *supra* note 79, at 715.

<sup>110</sup> *See* Bush, *supra* note 77, at 23.

<sup>111</sup> *See* Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) from ADR Services*, 26 U. MEM. L. REV. 975, 985-86 (1996) (noting that mediators can focus party communication to force each side to consider the reasonableness or unreasonableness of both his own case and that of his opponent, which will lead him to "realistically assess" whether continued litigation is appropriate). Likewise, some of mediation's specific features, like caucusing (the use of separate meetings with the parties to discuss/solicit information instead of a engaging in a group bargaining session), can help defuse interpersonal tensions that can lead the parties to ignore the best possible solution for all involved. *See* Burns, *supra* note 79, at 703.

<sup>112</sup> *See supra* note 29 and accompanying text.

<sup>113</sup> *See* Wetsch, *supra* note 68, at 8. This style of dispute resolution also plays more favorably to the expression of the individual defendant's wishes in a particular settlement than does negotiations, which is more focused on the "strategy of gamesmanship" than the client's communication of his or her wishes. *See* Calkins, *supra* note 68, at 284.

defendants (both innocent and factually guilty) the chance to inform the prosecutor of their individual situations.<sup>114</sup> If innocent, the defendant may state a case for his alibi that will make the prosecutor think twice about a trial on the merits or an oppressive plea offer.<sup>115</sup> If factually guilty, the defendant may present and receive consideration for mitigating factors that would play out at a post-trial sentencing but do not arise in the traditional plea bargaining process. Such factors could include a history of abuse against the defendant, familial responsibilities, remorse, and other reasons to lower a sentence that do not generally arise through plea negotiation.<sup>116</sup> Fairness returns when defendants are given sentences befitting their crimes and their lives, not just those that the prosecutors alone believe are applicable based on their assessments of the cases.<sup>117</sup> With a neutral mediator facilitating communication and encouraging truly mutually beneficial deals, both innocent and guilty defendants and the community at large will benefit from the mediation process.<sup>118</sup>

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<sup>114</sup> When applied to other types of legal disputes, this direct communication link has been found to reduce the stress involved in dispute resolution. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1502 (1992) (finding that mediation reduces hostility and party trauma in divorce cases).

<sup>115</sup> See McCoy, *supra* note 111, at 985–86. Mediation’s focus on discovering truth instead of which party has the best bargaining position or made the best impression on the jury is especially valuable in the criminal context, where the truth of guilt or innocence is of paramount importance given the looming imposition of prison sentences or other sanctions. See Calkins, *supra* note 68, at 280.

A second reason why the mediation process is so successful is that it is the most effective means yet devised to find the truth of a matter in dispute—to determine the real facts of a case uncolored by advocacy skills of the trial lawyer. It is a fact that the best trial lawyers are those who have honed the art of persuasion to the point where it does not matter which side of a case they may represent . . . The mediator, on the other hand, is, for the most part, able to eliminate the advocacy and get to the heart of the case.

*Id.*

<sup>116</sup> See Levine, *supra* note 43, at 394 (“Facilitative [mediation] skills would further uncover the underlying concerns of the defendant. These interests may include the frustration of not knowing how to change emotional patterns, the stress of financial conditions, or just a general feeling of regret, sorrow, or hopelessness.”).

<sup>117</sup> When such heightened communication increases the applicability of sentences created through plea bargaining, “win-win” solutions are achieved. See *id.*

<sup>118</sup> See William Haft, *More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 808–09 (2000) (suggesting that mediation’s restorative function can emphasize restoration of the community and rehabilitation of the offender to effect positive change).

## 2. Eliminating Unconscionable Plea Bargains

Another major problem with current plea negotiations is the repeated occurrence of unconscionable plea bargains.<sup>119</sup> Largely borne out of the unfettered discretion given prosecutors in the plea negotiation arena,<sup>120</sup> deals offered under the current system are often unfair and inconsistent with the aims of the criminal justice system.<sup>121</sup> The presence of a neutral mediator would aid in weeding out such unfair bargains, and would give defendants a reprieve from the vast prosecutorial power seen in plea negotiations.<sup>122</sup>

Plea bargains are typically analyzed using contract law principles.<sup>123</sup> Under this form of analysis, though, many of the “bargains” are unconscionable.<sup>124</sup> Courts interpreting contracts for possible unconscionability look to “whether there was a gross disparity of bargaining power and whether the parties understood the provisions of the contract.”<sup>125</sup> The first factor is immediately obvious in the plea bargaining context, as the prosecutor holds all of the power in designing and offering plea bargains, to the extent that plea bargaining resembles an administrative decision by the prosecutor more than a give and take by equivalent parties.<sup>126</sup> The second

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<sup>119</sup> There are examples of courts, both at the state and federal level, finding plea bargains unconscionable, though this occurrence is not highly frequent. *See, e.g.*, *United States v. Randolph*, 230 F.3d 243, 250–51 (6th Cir. 2000); *United States v. Perez*, 46 F. Supp. 2d 59, 72 (D. Mass. 1999); *Marshall v. State*, 590 N.E.2d 627, 630–31 (Ind. Ct. App. 1992); *State v. Aponte*, 763 N.E.2d 1205, 1210 (Ohio Ct. App. 2001). The textual assertion refers more to the bargains made under an oppressive power disparity and without proper explanation, which are necessarily unconscionable by definition. *See infra* notes 124–30.

<sup>120</sup> *See supra* note 11 and accompanying text.

<sup>121</sup> *See supra* note 33 and accompanying text.

<sup>122</sup> *See* Dubber, *supra* note 50, at 603 (“[If] plea bargaining can be turned into a noncoercive consultation among representatives of the state—or perhaps the victim—and the defendant and her representative, it would no longer be illegitimate.”).

<sup>123</sup> *See, e.g.*, *United States v. Isaac*, 141 F.3d 477, 481 (3d Cir. 1998); *United States v. Pollack*, 91 F.3d 331, 334 (2d Cir. 1996). Contractual rules like assent, reliance, and procedures for the interpretation of vague agreements have all been applied to the plea bargaining context. *See* Sigman, *supra* note 11, at 1321.

<sup>124</sup> *See* Gifford, *supra* note 36, at 55 (“Defendants acquiesce in plea bargains under many of the same conditions which would make civil contracts unenforceable under the doctrine of unconscionability.”).

<sup>125</sup> *Id.*

<sup>126</sup> *See supra* note 32 and accompanying text.

factor is less overt, but it remains a problem nonetheless.<sup>127</sup> This misunderstanding results in defendants often pleading to unfair bargains that they do not understand in the first place.<sup>128</sup> Such a result is at least inequitable and at worst a blatant, widespread violation of defendants' rights.<sup>129</sup>

Mediation would minimize this facet of current plea negotiations. While bargaining power cannot be fully equalized through mediation,<sup>130</sup> prosecutorial dominance can be undercut by the focus of finding a mutually

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<sup>127</sup> See Gifford, *supra* note 36, at 55 (stating that defendants accepting plea bargain offers "often do not understand the provisions of their 'contracts,' particularly those relating to sentencing"). One area where this problem has been frequently exhibited is in cases involving plea agreements made under § 5K1.1 of the Federal Sentencing Guidelines. According to the Guidelines, a defendant may plead guilty and receive a downward departure (reduction in sentence) if he provides substantial assistance to the prosecution on some matter. See, e.g., *United States v. Walton*, No. 97-3138, 1998 U.S. App. LEXIS 21011, \*2-4 (10th Cir. Aug. 26, 1998). However, the prosecutor unilaterally decides what constitutes substantial assistance, a fact many defendants fail to realize when they agree to the deal. *Id.*

<sup>128</sup> See Gifford, *supra* note 36, at 56 ("Defendants often receive less in plea bargaining than they perceive; like parties victimized by unconscionable contracts, they do not understand the terms of the bargain.").

<sup>129</sup> The federal criminal justice system has taken the position that, as long as a plea is voluntarily made, it is not unconscionable, even if the defendant does not truly understand the potential results of the agreement, including the true range of his agreed-upon sentence, when he makes it. See *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993). The prevailing notion is that there are proper safeguards in place to ensure that defendants who plead guilty are fully informed of the terms of the deal they struck and of the potential ramifications of this agreement through a Federal Rule of Criminal Procedure-ordered colloquy between the judge and defendant in open court. See *id.* at 837-38 (discussing the warning effect of Federal Rule of Criminal Procedure 11). Indeed, Rule 11 mandates that the judge must inform the defendant of the rights he is waiving by pleading guilty, the nature and penalties of the charges against him, and the court's discretion in sentencing (*i.e.*, that the judge is not bound by the recommended sentence), and that the judge be satisfied that the plea was voluntary and supported by the facts underlying the case. FED. R. CRIM. P. 11(b). According to this rule, the judge must determine whether or not the defendant sufficiently understands his rights and the situation for the plea to be accepted. *Id.* at (b)(1). This lofty ideal would provide adequate protection to defendants if it were seriously utilized but, unfortunately, it is not, due to widespread defendant "coaching." See *supra* note 57 and accompanying text.

<sup>130</sup> See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 103 (2000) (noting that a common criticism of mediation is that it is typically non-binding, making power differentials unlikely to be overcome).

beneficial solution.<sup>131</sup> A mediator removes the ability of one party to control communication by ensuring that both are given the opportunity to fairly and accurately portray their points of view and the justifications underlying them.<sup>132</sup> Similarly, in mediation, a prosecutor could not offer a facially unfair bargain without fear of being rejected or forced to compromise.<sup>133</sup> Defendants and their attorneys will be able to ask for justifications for the bargain offered and appeal to the mediator if an unacceptable one is given.<sup>134</sup> Minimizing the gross disparity through a process by which parties must communicate equally will lead to fairer agreements overall.<sup>135</sup>

Likewise, a mediator trained to help the parties reach an agreement can also serve to eliminate confusion over the terms of the agreement.<sup>136</sup> Using the skills of framing statements for clarity and understanding,<sup>137</sup> as well as other tactics designed to elucidate the communications between the parties, misunderstandings will occur less frequently.<sup>138</sup> It is the mediator's job to

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<sup>131</sup> See *id.* at 103–04 (“Once a party, however, has agreed to participate in a mediation, he or she has ceded power to the process and to the mediator. As one experienced mediator argues, ‘the mediator . . . has the most power in the room,’ and can use this power to move the parties to work out an agreement.”) (citation omitted) (quoting Dianne Neumann, *How Mediators Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227 (1992), cited in ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 432 (E. Wendy Trachte-Huber & Stephen K. Huber eds., 1996)).

<sup>132</sup> See *supra* note 75 and accompanying text.

<sup>133</sup> See Levine, *supra* note 43, at 394–95 (finding that an evaluative mediator could weigh the probable strengths and weaknesses of the prosecution and defense, thereby serving as a “reality check” if one side is too overzealous in its position, and enabling a fair settlement based on the correct information).

<sup>134</sup> If, for example, an offer is based on the prosecutor's racial prejudices, the mediator will be able to decry those as an unacceptable basis for agreement. See Bush, *supra* note 77, at 13 (suggesting mediators can improve information flow between parties, making the information more reliable and less tainted by false assumptions stemming from cognitive biases); Levine, *supra* note 43, at 395 (“[M]ediation would encourage the State to abandon, on a case-by-case basis, the inherent racism of the system by the prosecutor's recognition of the defendant's legitimate concerns and interests, including those based on his culture, race, familial, and community needs.”).

<sup>135</sup> See Levine, *supra* note 43, at 395.

<sup>136</sup> See Bush, *supra* note 77, at 12 (noting that scholars have found “that mediators can do things that will remove or reduce the parties' cognitive distortions of . . . information as they process it and make decisions”) (citations omitted).

<sup>137</sup> See *supra* note 78 and accompanying text.

<sup>138</sup> See Gatter, *supra* note 86, at 1115 (finding that mediation is useful because it focuses communication to identify and avoid conflicts based on lack of information and misunderstandings).

both facilitate an agreement and ensure that both parties understand it, contrary to the current practice where negotiations often result in an agreement with no one but the defense attorney to explain it to the client.<sup>139</sup> If that attorney is motivated by concerns other than his client's well-being,<sup>140</sup> the client may never fully understand what he pled guilty to and why he did so.<sup>141</sup> It is a matter of common sense that such a defendant will be dissatisfied with the way his case is resolved.

The goal of a just and successful alternative dispute resolution system is to empower individuals to make the correct decisions about settlement based on the merits of their case, not to confuse them with a legal morass.<sup>142</sup> Mediation's focus on understanding and true assent allows defendants to fully comprehend their cases and attempt to resolve them with the fairness implicit in the "beyond a reasonable doubt" standard guaranteed.<sup>143</sup> As such, a defendant pleading guilty will know why he is doing so and understand the full ramifications of the act, eliminating the confusion leading to the acceptance of unconscionable plea bargains in the current criminal justice system.

#### IV. CONCLUSION

The process of plea negotiation is an inequitable alternative means to resolve criminal cases. While it offers swift and efficient justice,<sup>144</sup> it gives

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<sup>139</sup> See Bush, *supra* note 77, at 14 ("[R]esearch and experience has shown that gathering reliable information and analyzing it accurately is much easier when parties are working with a mediator than when they are working alone.").

<sup>140</sup> See *supra* notes 96–98 and accompanying text.

<sup>141</sup> See *supra* note 127 and accompanying text.

<sup>142</sup> See BUSH & FOLGER, *supra* note 71, at 84 (suggesting that mediation can lead to the empowerment of parties, which "is achieved when disputing parties experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face, regardless of external constraints").

<sup>143</sup> See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 860 (1997) (finding that Bush and Folger's approach allows parties to "better understand their goals, options, skills, and resources, and then make conscious decisions about how they want to handle a dispute").

<sup>144</sup> See Guidorizzi, *supra* note 18, at 765–67 (asserting that prosecutors, defense attorneys (especially public defenders), judges, and victims all benefit from the expedited resolution of cases arising from the plea negotiation process); see also Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 991–92 (1995) (suggesting that defendants benefit from the efficiency of plea negotiations, in that their cases are quickly resolved, allowing them to avoid the fear and anxiety that accompany going to trial). The

prosecutors nearly unfettered discretion and perverts the American criminal justice system's hallowed presumption of innocence.<sup>145</sup> Innocent defendants are encouraged to plead guilty lest they suffer the wrath of a scorned prosecutor who offered them an unconscionable plea settlement. Defense attorneys are often rewarded for laziness and less-than-zealous advocacy by the quick and easy payment that comes from resolving such cases expediently. The system processes defendants efficiently, but accuracy and fairness are largely ignored.<sup>146</sup> While these goals may be less than important in the civil sphere, the criminal justice system is built on the weighty standard of due process for all defendants.

Mediation offers a way to resolve these shortcomings without plunging the entire system into an inefficient chaos. By putting prosecutorial discretion in check and forcing defense attorneys to do their jobs effectively, accuracy and fairness return, as does confidence in the adjudication process. With a focus on communication and understanding, mediation would make the plea bargaining procedure a more reliable means of procuring guilty pleas and taking innocent defendants out of the system. Because a full trial is not required, efficient justice is achieved without compromising the intrinsic fairness of the criminal justice system. After screening cases through this process, the trial can be utilized as a reliable adversarial proceeding, and not merely a witch hunt initiated after a round of failed negotiations.

Of course, not all cases should be mediated. Plea mediation would only be appropriate where plea negotiations are currently used, and for the same

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efficiency gains offered by plea negotiations are so valuable that only a very limited number of jurisdictions have attempted to operate without using the process. *See* Colquitt, *supra* note 5, at 707.

<sup>145</sup> Examining the benefits of plea bargaining alongside the drawbacks, it is clear that the system compromises fairness and due process for the sake of efficiency. *See* Guidorizzi, *supra* note 18, at 768–69 (noting that most criticism of plea bargaining focuses on it undermining the legal system's integrity by circumventing the strict standards of due process and overall fairness).

<sup>146</sup> *See* Colquitt, *supra* note 5, at 704 (“[I]t is more likely that plea bargaining endures because courts and prosecutors routinely rely on the process to dispose of their caseloads in an efficient and timely fashion.”). Still, even critics of plea negotiations agree that, because of this great efficiency, a better system must be put into place if plea negotiations are to be dismissed. *See* Alschuler, *supra* note 55, at 961 (“Anyone who seeks a plan for abolishing plea bargaining that would preclude all revision of criminal charges, forbid all guilty pleas, or seek in other ways to foreclose every conceivable route of evasion will not find it in this article. Indeed, plea bargaining probably cannot be abolished.”); Colquitt, *supra* note 5, at 709–10 (“Plea negotiation is simply too important and too ingrained in our criminal justice system to abandon it without identifying and providing a suitable replacement.”).



## **MEDIATION AND PLEA BARGAINING**

reasons—to efficiently resolve criminal cases without compromising the weighty requirements of the American justice system. Unfortunately, plea negotiations have failed to live up to this standard. To protect the sanctity of the basic principles of the criminal justice system, they must be replaced. Plea mediation offers an efficient and effective alternative that is free from the unconscionable effects that taint the current system of bargained justice in this country.

